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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHERMAN LEVEL DAVIS,) No. C 08-1978 CW (PR)
)
Petitioner,) ORDER STAYING HABEAS
) PROCEEDINGS; DIRECTING
v.) PETITIONER TO FILE STATUS
GEORGE A. ORTIZ, Warden,) REPORTS; AND DIRECTING CLERK TO
Respondent.) CLOSE THIS CASE ADMINISTRATIVELY
) UNTIL THE COURT ISSUES ORDER
) LIFTING STAY
)

INTRODUCTION

Petitioner Sherman Level Davis is a prisoner of the State of California who is incarcerated at California State Prison - Corcoran. He filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which he challenges the validity of his state conviction. Venue is proper because Petitioner is challenging a conviction and sentence imposed by the Alameda County Superior Court, which is located in this judicial district. See 28 U.S.C. § 2241(d). Petitioner has paid the full filing fee.

BACKGROUND

According to the allegations in the petition, a jury found Petitioner guilty of fourteen offenses including second-degree robbery, oral copulation, attempted robbery, and felon in possession of a firearm. Petitioner was sentenced to 443 years to life in prison. The California Court of Appeal affirmed the judgment of conviction in 2005, and the California Supreme Court denied review later the same year.

1 The present petition was filed on April 3, 2008.¹ Petitioner
2 raises the following claims for relief: (1) failure of trial
3 counsel to call witnesses; (2) failure of trial counsel to present
4 evidence; (3) failure of trial counsel to impeach witnesses;
5 (4) failure of trial counsel to suppress evidence;
6 (5) prosecutorial misconduct; (6) juror misconduct; (7) failure of
7 trial counsel to investigate misconduct; (8) failure of trial
8 counsel to conduct a pretrial investigation and alleged conflict
9 of interest by trial counsel; (9) a "cumulative effect of error"
10 depriving him of his Fifth, Sixth, and Fourteenth Amendment due
11 process rights; (10) error by the trial court in denying his
12 motion to dismiss his trial counsel; and (11) error by the trial
13 court denying his equal protection and due process rights as
14 guaranteed under the United States Constitution.

DISCUSSION

I. Standard of Review

17 A district court may entertain a petition for a writ of
18 habeas corpus "in behalf of a person in custody pursuant to the
19 judgment of a State court only on the ground that he is in custody
20 in violation of the Constitution or laws or treaties of the United

22 ¹ A pro se federal habeas petition is deemed filed on the date
23 it is delivered to prison authorities for mailing. See Saffold v.
Newland, 250 F.3d 1262, 1268 (9th Cir. 2001), vacated and remanded on
other grounds, Carey v. Saffold, 536 U.S. 214 (2002) (holding that a
24 federal or state habeas petition is deemed filed on the date the
prisoner submits it to prison authorities for mailing, rather than the
25 date it is received by the courts). April 3, 2008 is the date the
instant petition was signed and the earliest date that the petition
26 could have been delivered to prison authorities for mailing. The
Court assumes for the purposes of this discussion that the petition
27 was delivered to prison authorities on that date.

1 States." 28 U.S.C. § 2254(a); see Rose v. Hodges, 423 U.S. 19, 21
2 (1975). The court shall issue an order directing the respondent
3 to show cause why the writ should not be granted unless it plainly
4 appears from the petition that the petitioner is not entitled to
5 relief. See 28 U.S.C. § 2243; Rule 4 of the Rules Governing
6 Habeas Corpus Cases Under Section 2254.

7 II. Timeliness

8 The Antiterrorism and Effective Death Penalty Act of 1996
9 (AEDPA), which became law on April 24, 1996, imposed a statute of
10 limitations on petitions for a writ of habeas corpus filed by
11 state prisoners. Petitions filed by prisoners challenging non-
12 capital state convictions or sentences must be filed within one
13 year of the latest date on which: (A) the judgment became final
14 after the conclusion of direct review or the time passed for
15 seeking direct review; (B) an impediment to filing an application
16 created by unconstitutional state action was removed, if such
17 action prevented petitioner from filing; (C) the constitutional
18 right asserted was recognized by the Supreme Court, if the right
19 was newly recognized by the Supreme Court and made retroactive to
20 cases on collateral review; or (D) the factual predicate of the
21 claim could have been discovered through the exercise of due
22 diligence. 28 U.S.C. § 2244(d)(1)(A)-(D). Also, "[t]he time
23 during which a properly filed application for state post-
24 conviction or other collateral review with respect to the
25 pertinent judgment or claim is pending shall not be counted toward
26 any period of limitation." Id. § 2244(d)(2).

27 A state prisoner with a conviction finalized after April 24,
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1 1996, such as Petitioner, ordinarily must file his federal habeas
2 petition within one year of the date his process of direct review
3 came to an end. See Calderon v. United States District Court
4 (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997), overruled in part
5 on other grounds by Calderon v. United States District Court
6 (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc).

7 The one-year period generally will run from "the date on
8 which the judgment became final by conclusion of direct review or
9 the expiration of the time for seeking such review." 28 U.S.C.
10 § 2244(d)(1)(A). "Direct review" includes the ninety-day period
11 during which a criminal appellant can file a petition for a writ
12 of certiorari from the United States Supreme Court, whether he
13 actually files such a petition or not. Bowen v. Roe, 188 F.3d
14 1157, 1159 (9th Cir. 1999).

15 In the present case, the judgment became final for purposes
16 of the statute of limitations on May 5, 2006 because Petitioner
17 did not file a petition for a writ of certiorari in the United
18 States Supreme Court within ninety days. Id. Accordingly,
19 Petitioner was required to file a federal habeas corpus petition
20 no later than May 4, 2007. Because he did not file the present
21 petition until April 16, 2008 -- nearly a year after the
22 limitations period had expired -- the petition is untimely unless
23 he can show that he is entitled to equitable tolling.²

24 The one-year limitations period can be equitably tolled
25

26 ² Because Petitioner has not yet filed for any collateral relief
27 in the state courts, the Court need not consider whether he is
entitled to statutory tolling.

1 because § 2244(d) is a statute of limitations and not a
2 jurisdictional bar. See Beeler, 128 F.3d at 1288. "When external
3 forces, rather than a petitioner's lack of diligence, account for
4 the failure to file a timely claim, equitable tolling of the
5 statute of limitations may be appropriate." Miles v. Prunty, 187
6 F.3d 1104, 1107 (9th Cir. 1999). Equitable tolling will not be
7 available in most cases because extensions of time should be
8 granted only if "'extraordinary circumstances' beyond [a]
9 prisoner's control make it impossible to file a petition on time."
10 Beeler, 128 F.3d at 1288 (citation and internal quotation marks
11 omitted). The prisoner must show that "the 'extraordinary
12 circumstances' were the cause of his untimeliness." Spitsyn v.
13 Moore, 345 F.3d 796, 799 (9th Cir. 2003) (citations omitted). The
14 Ninth Circuit has said that the petitioner "bears the burden of
15 showing that this extraordinary exclusion should apply to him."
16 Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002). "'[T]he
17 threshold necessary to trigger equitable tolling [under AEDPA] is
18 very high, lest the exceptions swallow the rule.'" Id. at 1066
19 (quoting United States v. Marcelllo, 212 F.3d 1005, 1010 (7th
20 Cir.), cert. denied, 531 U.S. 878 (2000)). The grounds for
21 granting equitable tolling are "highly fact dependant". Lott v.
22 Mueller, 304 F.3d 918, 923 (9th Cir. 2002). Where a prisoner
23 fails to show "any causal connection" between the grounds upon
24 which he asserts a right to equitable tolling and his inability to
25 file a federal habeas application timely, the equitable tolling
26 claim will be denied. Gaston v. Palmer, 417 F.3d 1030, 1034-35
27 (9th Cir. 2005), amended, 447 F.3d 1165 (9th Cir. 2006).

1 However, "[r]ather than let procedural uncertainties
2 unreasonably snuff out a constitutional claim, the issue of when
3 grave difficulty merges literally into 'impossibility' should be
4 resolved in [a petitioner's] favor." Lott, 304 F.3d at 920. When
5 a prisoner is proceeding pro se, his allegations regarding
6 diligence in filing a federal petition on time must be construed
7 liberally. Roy v. Lampert, 465 F.3d 964, 970 (9th Cir. 2006).

8 Attached to the petition is a motion entitled "Motion and
9 Declaration of Good Cause for 'Equitable Tolling' and Extension of
10 Time to File Federal Petition - Criminal Conviction" filed by
11 Petitioner in his previous habeas action, Case no. C 07-04447 MJJ
12 (PR). (Aug. 20, 2007 Mot. in Case no. C 07-04447 MJJ (PR) at 1.)
13 The document presents the reasons why Petitioner believes he is
14 entitled to equitable tolling but contains neither grounds for
15 relief nor a statement of federal jurisdiction. On October 2,
16 2007, United States District Court Judge Martin J. Jenkins
17 dismissed Petitioner's previous habeas action for failure to state
18 a case or controversy pursuant to the United States Constitution.
19 (Oct. 3, 2007 Order in Case no. C 07-04447 MJJ (PR) at 1.) This
20 dismissal was without prejudice to Petitioner's filing "a petition
21 for a writ of habeas corpus or a complaint for other relief."
22 (Id. at 2.)

23 In Petitioner's motion for equitable tolling in Case no.
24 C 07-04447 MJJ (PR), he states that on June 15, 2006, about one
25 month after the statute of limitations began to run, he was
26 transferred from Pleasant Valley State Prison to Corcoran State
27 Prison. (Aug. 20, 2007 Mot. in Case no. C 07-04447 MJJ (PR) at
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1 2.) He states that, during the move, his legal materials were
2 "lost" and that he was prevented from preparing the instant
3 petition during the time that his materials were missing. (Id. at
4 3.) Petitioner adds that "it was a total nightmare watching those
5 eight months pass by with nothing he could do to help himself."
6 (Id.) Petitioner filed a grievance in the Kings County Superior
7 Court, which apparently resulted in the return of his materials on
8 August 6, 2007. To support this claim, Petitioner attaches a
9 letter from the California Department of Justice to Superior Court
10 Judge Lynn C. Atkinson dated August 3, 2007, which states that
11 Petitioner's materials had been "inadvertently lost by prison
12 officials" during the prisoner transfer process but that they had
13 eventually been mailed to him. (Id. at 4.) Petitioner also
14 attaches a copy of the shipping label attached to his materials
15 dated August 3, 2007. (Id. at 5.)

16 Circumstances out of Petitioner's control may have made it
17 legally "impossible" for him to complete his federal habeas
18 petition within the normal statute of limitations. According to
19 the letter to Judge Atkinson, Petitioner was deprived of his
20 original trial transcript, the appellate court's decision, and
21 other important documents. (Id. at 4.) Because a number of
22 Petitioner's claims deal with the events that occurred at trial,
23 it may have been impossible for him to submit those claims without
24 the relevant legal materials. Therefore, the limitations period
25 may be equitably tolled from June 15, 2006 (the date of his prison
26 transfer) until August 6, 2007, the date when his materials were
27 returned to him. Because Petitioner may be entitled to equitable
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1 tolling, the present petition may have been timely filed on April
2 3, 2008. Subject to Respondent's right to contest these facts,
3 the Court will not dismiss the petition on its own motion for
4 untimeliness.

5 **III. Exhaustion**

6 Prisoners in state custody who wish to challenge in federal
7 habeas proceedings either the fact or length of their confinement
8 are first required to exhaust state judicial remedies by
9 presenting the highest state court available with a fair
10 opportunity to rule on the merits of each and every claim they
11 seek to raise in federal court. See 28 U.S.C. § 2254(b),(c); Rose
12 v. Lundy, 455 U.S. 509, 515-16 (1982). If available state
13 remedies have not been exhausted as to all claims, the district
14 court must dismiss the petition. Id. at 510; Guizar v. Estelle,
15 843 F.2d 371, 372 (9th Cir. 1988).

16 Petitioner concedes that he has not exhausted his state
17 remedies as to claims one through nine. However, he alleges that
18 he has appealed claims ten and eleven to the California Court of
19 Appeal and the California Supreme Court. It appears that
20 Petitioner has filed a mixed petition containing exhausted and
21 unexhausted claims. Therefore, the action must be dismissed as a
22 mixed petition under Rose, 455 U.S. at 510, or in the alternative,
23 Petitioner may elect to delete the unexhausted claim and proceed
24 on the remaining claims.

25 **IV. Request to Stay Mixed Petition**

26 Exhibit four of Petitioner's habeas petition, entitled
27 "Notice" asks the Court to stay this case in order to allow him to
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1 exhaust claims one through nine in state court. (Pet'r Ex. 4.)

2 Prisoners who may run the risk of having the federal statute
3 of limitations expire while they are exhausting their state
4 remedies may avoid this predicament "by filing a 'protective'
5 petition in federal court and asking the federal court to stay and
6 abey the federal habeas proceedings until state remedies are
7 exhausted." Pace v. DiGuaglielmo, 544 U.S. 408, 416 (2005) (citing
8 Rhines, 544 U.S. at 277-78). District courts have the authority
9 to issue stays and the AEDPA does not deprive them of that
10 authority. Rhines v. Webber, 544 U.S. 269, 277-78 (2005). The
11 district court's discretion to stay a mixed petition is
12 circumscribed by AEDPA's stated purposes of reducing delay in the
13 execution of criminal sentences and encouraging petitioners to
14 seek relief in the state courts before filing their claims in
15 federal court. Id. Because the use of a stay and abeyance
16 procedure has the potential to undermine these dual purposes of
17 AEDPA, it is only appropriate where the district court has first
18 determined that there was good cause for the petitioner's failure
19 to exhaust the claims in state court and that the claims are
20 potentially meritorious. Id. Moreover, when granting a stay, the
21 district court must effectuate the timeliness concerns in AEDPA by
22 placing "reasonable time limits on a petitioner's trip to state
23 court and back." Id. at 278. "[I]t likely would be an abuse of
24 discretion for a district court to deny a stay and to dismiss a
25 mixed petition if the petitioner had good cause for his failure to
26 exhaust, his unexhausted claims are potentially meritorious, and
27 there is no indication that the petitioner engaged in

1 intentionally dilatory litigation tactics." Rhines, 544 U.S. at
2 278. In such circumstances, the district court should stay,
3 rather than dismiss, the mixed petition. Id. (citing Rose, 455
4 U.S. at 522 (the total exhaustion requirement was not intended to
5 "unreasonably impair the prisoner's right to relief")).

6 Petitioner claims that, in the aftermath of his prison
7 transfer, he was concerned that if he were to pursue his state
8 court petition prior to his federal petition, he would be denied
9 an opportunity to present his case in federal court due to the
10 statute of limitations. He states, "I felt that now that all of
11 my legal materials were returned to me . . . [i]t was important
12 that [I] exercise complete diligence in getting [my] completed
13 habeas corpus to this Court." (Id.) Apparently, Petitioner has
14 filed a "protective" petition to safeguard his federal habeas
15 corpus rights.

16 Under the circumstances alleged by Petitioner, he has
17 demonstrated good cause for his failure to exhaust his claims in
18 state court. Liberally construed, Petitioner's unexhausted claims
19 -- including allegations of ineffective assistance of counsel,
20 prosecutorial misconduct, juror misconduct, cumulative error and
21 trial court error -- are all cognizable bases for federal habeas
22 relief. This is Petitioner's first habeas petition, and there is
23 no evidence that he seeks the stay for improper purposes. See
24 Fetterly v. Paskett, 997 F.2d 1295, 1301-02 (9th Cir. 1993)
25 (holding that a stay for the purpose of permitting exhaustion of
26 unexhausted claims should be granted only if the claims petitioner
27 seeks to pursue are cognizable under § 2254; there is a likelihood
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1 of prejudice to petitioner if the stay is not granted; and there
2 is no evidence that the motion for a stay is brought to delay,
3 vex, or harass, or that the request is an abuse of the writ).
4 Accordingly, Petitioner's request for a stay of habeas proceedings
5 pending exhaustion of claims one through nine is GRANTED.

6 CONCLUSION

7 These proceedings are hereby STAYED pending Petitioner's
8 exhaustion of his state judicial remedies. Petitioner must act
9 diligently in exhausting his state judicial remedies, or the stay
10 may be lifted. He must file quarterly reports describing the
11 progress of his state court proceedings, commencing thirty (30)
12 days from the date of this Order and continuing every ninety (90)
13 days thereafter until his state court proceedings are terminated.
14 He must also attach to his status reports copies of the cover page
15 of any document that he files with or receives from the state
16 courts relating to the claims.

17 The Clerk of the Court shall ADMINISTRATIVELY CLOSE the file
18 pending the stay of this action. Nothing further will take place
19 in this action until Petitioner receives a final decision from the
20 highest state court and, within thirty (30) days of doing so,
21 moves to reopen the action, lift the Court's stay and amend the
22 stayed petition to add the newly-exhausted claims.

23 Additionally, Petitioner has named Derral G. Adams as
24 Respondent. The rules governing relief under 28 U.S.C. § 2254
25 require a person in custody pursuant to the judgment of a state
26 court to name the "'state officer having custody'" of him as the
27 respondent. See Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th
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1 Cir. 1996) (quoting Rule 2(a) of the Rules Governing Habeas Corpus
2 Cases Under Section § 2254). The proper respondent is George A.
3 Ortiz, the warden at Corcoran State Prison where Petitioner is
4 incarcerated. Therefore, the Court directs the Clerk of the Court
5 to replace Derral G. Adams with Warden Ortiz as Respondent in this
6 action.

7 IT IS SO ORDERED.

8 DATED: 7/7/08



9 CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SHERMAN L DAVIS,
Plaintiff,
v.
DERRAL G ADAMS et al,
Defendant.
Case Number: CV08-01978 CW
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 7, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Sherman Level Davis
Corcoran State Prison
Prisoner Id D-40369
4B2L-1
P.O. Box 8800
Corcoran, CA 93212

Dated: July 7, 2008

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk